80-1159

Supreme Court, U. S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

RODNEY HOLLINGSWORTH,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF OF PETITIONER

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The Petitioner, RODNEY HOLLINGSWORTH, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Georgia.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER PETITIONER WAS DENIED HIS FOURTH AMENDMENT RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, ABSENT EXIGENT CIRCUMSTANCES, THE POLICE CONDUCTED A WARRANTLESS SEARCH OF HIS BRIEFCASE.

2. WHETHER PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN A ONE TO ONE CONFRONTATION WAS HELD BETWEEN PETITIONER AND A POLICE OFFICER, PRIOR TO THE OFFICER'S IN-COURT IDENTIFICATION OF PETITIONER.

OPINIONS BELOW

On September 26, 1980, the Georgia Court of Appeals rendered a decision affirming the conviction of Petitioner in two non-jury trials consolidated for purposes of appeal. See Appendix A. Petitioner filed his application for a Writ of Certiorari in the Supreme Court of Georgia on October 16, 1980, and the application was denied on October 30, 1980. See Appendix B. A Motion for Reconsideration was denied in the same Court on November 13, 1980. See Appendix C.

JURISDICTION

Jurisdiction of this appeal is grounded in a September 26, 1980 decision of the Georgia Court of Appeals. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

> No person . . . shall be . . . deprived of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner was charged in two separate indictments with violations of the Georgia Controlled Substances Act. The two cases were consolidated for purposes of appeal, each case presenting a single issue on appeal. A separate statement of each case will follow.

I. GEORGIA COURT OF APPEALS NO. 60448:

Petitioner was charged with violation of the Georgia Controlled Substances Act in that he possessed heroin, a Schedule I Controlled Substance. A Motion to Suppress Evidence was filed alleging that a warrantless search and seizure violated Petitioner's Fourth Amendment right. On February 14, 1980, the trial court entered its order denying Petitioner's motion. A non-jury trial was held in this matter, with the testimony from the Motion to Suppress hearing stipulated as the evidence at trial. A guilty verdict was returned by the Court on April 4, 1980. An appeal was taken to the Georgia Court of Appeals raising the question of whether the trial court erred in denying Petitioner's Motion to Suppress Evidence. On September 26, 1980, the Georgia Court of Appeals rendered a decision affirming the conviction. Petitioner filed an Application for a Writ of Certiorari in the Supreme Court of Georgia on October 16, 1980, and the Application was denied on October 30, 1980. A Motion for Reconsideration was denied in the same Court on November 13, 1980.

Petitioner respectfully submits the following chronology with respect to the issue presented here:

On October 15, 1979, Officer T. D. Tumlin of the Atlanta Police Department received information from an informant that a black man named "Rodney" was in possession of heroin at 875 Ashby Place (V.1:8). The informant advised the police that the contraband in question could be located in a vehicle operated by this party. (V.1:11). Detective Tumlin then proceeded, along with three other officers, to the above described address. (V.1:30). No attempt was made by any of the officers to obtain a search warrant (V.1:29) nor was any attempt made to send a patrol car to the area for purposes of securing it while application for a warrant was made. (V.1:31). A search warrant could have been acquired within 30 minutes. (V.1:28).

Upon arrival at the address, an abandoned dwelling, the police found several black males present, including the Petitioner who was seated on the front porch. (V.1:10). The Petitioner was immediately subjected to a pat-down search and was restrained from leaving. (V.1:27). The pat-down search produced identification documents. (V.1:24). Permission was then requested and granted to search the Petitioner's vehicle. (V.1:11). No contraband was found inside the vehicle as had been suggested by the informer. (V.1:11). This search took approximately 15 minutes. (V.1:38). No attempt was made to recontact the informer, who was not on the scene. (V.1:27).

Sixteen bags containing small amounts of heroin were found behind the Petitioner on the screened-in area of the porch of the home in question. (V.1:11). Petitioner denied having any knowledge of the contraband and requested permission to leave. (V.1:11-12). Since no evidence existed

to connect the contraband with the Petitioner, he was advised that he could go. (V.1:12). He entered his car and exited the area at a safe rate of speed, not indicative of a person attempting flight. (V.1:13-18).

The Police then proceeded with their investigation despite the fact that the Petitioner and his car were no longer present. The officers then entered the premises at 875 Ashby Place where a zippered, closed attache case was discovered. (V.1:13). Although the informant in the case had mentioned nothing about an attache case, the case was opened. (V.1:26). Inside, 180 bags containing small amounts of heroin were discovered, as well as Petitioner's outdated driver's license. (V.1:13). The attache case was not visible from the porch but could only be viewed after the front door of the abandoned premises had been opened. (V.1:17). Petitioner was arrested at his home four days after the discovery of the attache case. (V.1:34).

II. GEORGIA COURT OF APPEALS NO. 60449:

Petitioner was charged with violation of the Georgia Controlled Substances Act in that he sold heroin, a Schedule I substance, to an undercover officer. A Motion to Suppress Evidence was filed, Petitioner claiming that a suggestive eyewitness identification violated his Fifth Amendment right to due process of law. On February 14, 1980, the trial court entered its order denying Petitioner's motion. A non-jury trial was held in this matter, with the testimony from the Motion to Suppress hearing stipulated as the evidence at trial. A guilty verdict was returned by the Court on April 4, 1980. An appeal was taken to the Georgia Court of Appeals raising the question of whether the trial court erred in denying Petitioner's Motion to

Suppress the eyewitness identification. On September 26, 1980, the Georgia Court of Appeals rendered a decision affirming the conviction. Petitioner filed an Application f r Writ of Certiorari in the Supreme Court of Georgia on October 16, 1980, and the Application was denied on October 30, 1980. A Motion for Reconsideration was denied in the same Court on November 13, 1980.

Petitioner respectfully submits the following chronology with respect to the issue presented here:

On September 26, 1979, during daylight hours, Special Agent Ellerbe of the Georgia Bureau of Investigation, approached a man on a street corner for the purpose of making an undercover narcotics buy. (V.2:15). A sale took place. Ellerbe was previously unacquainted with the individual with whom the transaction occurred, (V.2:17) and was not aware of his name, knowing him only as "Rodney" or "Big Man". (V.2:10). At the time of the sale there were other black males present. (V.2:20). No surveillance photographs were taken of the scene. (V.2:18). No arrest took place, despite the fact that another officer was stationed nearby if assistance was needed. This transaction was one of at least ten undercover operations in which Ellerbe was involved during the period from late August to early October. (V.2:13). Each occasion involved a transaction with black males. (V.2:12).

It was Ellerbe's testimony that his next contact with "Rodney" occurred at the Fulton County Jail, but that prior to that encounter, he did catch fleeting glimpses of the suspect "on the street" while the officer was in a moving vehicle. (V.2:15-17). Each observation lasted only a few seconds and Petitioner was not engaged in any illegal activity. (V.2:19). Again, no arrest took place, despite

the fact that on one occasion two other officers were present with Ellerbe. (V.2:17).

At the end of November, Ellerbe made application for and received an arrest warrant for the perpetrator of the above described sale. (V.2:25). The warrant named "Rodney Bigman" but gave no last name or physical description. (V.2:25). Shortly thereafter, Ellerbe appeared at the Fulton County Jail (V.2:28) and requested to see the Petitioner who had been apprehended on the Indictment resulting in Appeal No. 60448. The alleged purpose of the visit was to execute the arrest warrant. Ellerbe was aware of Petitioner's full name at the time but failed to amend the arrest warrant. (V.2:26).

Ellerbe testified at the hearing on the Motion to Suppress the Eyewitness Identification, that he had been furnished with the name Hollingsworth after describing the suspect to two Atlanta Police Detectives. (V.2:23). Such sharing of information among law enforcement officials was stated to be common practice. The description in its entirety was that the suspect was "a real big guy." (V.2:23). No other description was given. (V.2:23). Ellerbe was also informed by these same detectives that this party was in custody on other charges. (V.2:33). Apparently this exchange of information occurred after Ellerbe had made application for the arrest warrant; hence only the name "Rodney Bigman" appeared on the warrant. No similar exchanges of information occurred between Ellerbe and Jimmy Holloway, an Atlanta policeman who was his frequent partner and was *with him when he made the September 26th purchase.* (V.2:17, 51). Holloway testified that three days after the sale in question, he was aware that "Rodney" was a suspect and that his last name was Hollingsworth. (V.2:50). He did not inform

Ellerbe, however, despite his awareness of Ellerbe's responsibility in the case, since Ellerbe had not asked. (V.2:57).

The meeting at the jail took place in a small interview cell, in which the parties were confronted with each other on a one to one basis. (V.2:33). Ellerbe remembered from this meeting that Petitioner was approximately 6'5", that he weighed 250 pounds, and that he had no facial hair. (V.2:33). Counsel was not present during the interview and no prior attempts had been made by Ellerbe to determine if Petitioner was represented by counsel. (V.2:34). Petitioner had been represented by counsel at a Preliminary Hearing which occurred on October 19, 1979.

An indictment was returned on December 21, 1979, based largely on Ellerbe's testimony.

ARGUMENT

I. GEORGIA COURT OF APPEALS NO. 60448 EXPLICATION OF WHETHER THE WARRANT REQUIREMENT AS UPHELD IN *UNITED STATES V. CHADWICK*, SHOULD BE EXTENDED TO APPLY TO A SITUATION WHERE THE DEFENDANT IS FORCED TO LEAVE BEHIND HIS PROPERTY BECAUSE OF POLICE CONDUCT.

A. THE FOURTH AMENDMENT PROHIBITS WARRANTLESS SEARCHES AND SEIZURES, ABSENT A RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT.

Warrantless searches and seizures are valid under certain circumstances. See *United States v. Edwards*, 415 U.S. 800 (1974), *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The search of Petitioner's attache case was war-

rantless and the evidence seized should be suppressed unless a recognized exception to the warrant requirement can be shown. See *Katz v. United States*, 389 U.S. 347, 357 (1967). None of the exceptions to the warrant requirement, however, will support the instant search. In the situation at hand, the police had the attache case in their custody and could have easily retained it while application was made to a neutral magistrate for a warrant. No exigent circumstances existed as the briefcase was not about to vanish. Nonetheless, an illegal warrantless search went forward.

United States v. Chadwick, 433 U.S. 1 (1977) is applicable to the issue presented here. There, the Supreme Court held that a warrant must be obtained prior to a search of an arrestee's luggage once the luggage has come under the exclusive control of the officer if no exigent circumstances exist to support the need for an immediate search. In *United States v. Haley*, 581 F.2d 723 (8th Cir. 1978) it was noted that a briefcase is "luggage" as defined by *Chadwick* in that it was intended as a repository of personal effects, and thus entitled to the same degree of protection. No question exists that the police here had exclusive control of the attache case and that a warrant could have been obtained.

B. ILLEGAL POLICE CONDUCT FORCED PETITIONER TO ABANDON HIS ATTACHE CASE.

It is well settled that if a person has voluntarily abandoned property, he has no standing to complain of its search and seizure. *Abel v. United States*, 362 U.S. 217 (1960). Abandonment, including the question of the voluntariness of it, is primarily a question of intent, which may be inferred from words, acts and other objective facts. *United States v. Colbert*, 474 F.2d 174 (5th Cir.

1973). If the acts taken to establish the abandonment have been brought about by unlawful police conduct, then the abandonment cannot be viewed as voluntary and a party will retain his reasonable expectation of privacy with regard to it. *United States v. Jackson*, 544 F.2d 407 (9th Cir. 1976).

As noted previously, before the Petitioner left the house on Ashby Place he was detained and subjected to a search. The nature and length of the detention was not sufficient to constitute an arrest, but was nonetheless a seizure for purposes of the Fourth Amendment.

In *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979) the Court recognized that "any restraint on movement" is sufficient to constitute a seizure. At 1041. See also *United States v. Mendenhall*, 100 S.Ct. 1870 (1980); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Accordingly, the seizure must be based on "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1 (1968).

Here, the stop and detention of the Petitioner was made on the basis of information provided by an informer. The information was supplied by a "tipster", who, by definition, had not witnessed nor participated in the offense. Standing alone, this does not provide the specific and articulable facts necessary to justify a detention, since the provider of the information himself possessed no specific and articulable facts.

The detention and the search of the Petitioner and his vehicle caused anxiety in the mind of the Petitioner and caused him to flee the Ashby Place address at his earliest possible opportunity. Petitioner's state of mind was

shown by the uncontraverted evidence adduced at the hearing on the Motion to Suppress, i.e. that he asked permission to leave after the illegal seizure had occurred. (V.1:12). His fear was well justified since if the law enforcement authorities were willing to commit one illegality, there was little doubt that they would proceed with another. Under the circumstances, it can scarcely be stated that the Petitioner abandoned his property.

Based on the foregoing reasons, Petitioner contends that *United States v. Chadwick, supra,* should be extended to apply to the instant case. Petitioner's attache case was in the exclusive control of the officers. The illegal conduct of the officers forced Petitioner to leave behind his property. A warrant therefore, should be required before the attache case could be opened by the officers.

II. GEORGIA COURT OF APPEALS NO. 60449

The due process clause of the Fourteenth Amendment requires that the "showing" of a suspect for purposes of pre-trial identification not be so unnecessarily suggestive as to be conducive to irreparable mistaken identification. *Stovall v. Denno,* 388 U.S. 293 (1967). Pre-trial procedures which can be impermissibly suggestive are not limited to lineups, but have been extended to include the viewing of photographs, *Manson v. Brathwaite,* 432 U.S. 98 (1977) as well as one on one confrontations. *United States v. Wade,* 388 U.S. 218 (1967).

A. APPLICATION OF THE TEST ENUNCIATED IN *NEIL V. BIGGERS,* 409 U.S. 188 (1972).

This Court has enunciated a two prong test for determining whether a party's due process rights are violated during an identification procedure: first, whether the identification procedure used was unnecessarily sugges-

tive, and secondly, "whether under the totality of the circumstances, the identification was reliable, even though the confrontation procedure was suggestive". *Neil v. Biggers*, 409 U.S. 188 (1972).

A view of the totality of the circumstances, by its very definition necessitates a case by case examination of the facts. Nonetheless, case law has enumerated factors to consider in reviewing the totality of the circumstances. They include the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the accused, and the level of certainty demonstrated by the witness at the confrontation. *Neil v. Biggers, supra.* These factors have been adopted by Georgia courts. *Clempson v. State,* 144 Ga. App. 625 (1978).

The first factor to consider is the opportunity for observation which Agent Ellerbe possessed during the commission of the crime. Although the alleged sale was conducted in broad daylight (V.2:41), a number of factors limited the Agent's opportunity for observation. One of these was time, as only 10-15 minutes elapsed between the first siting of the suspect and the leaving of the area by undercover agents. Since part of this time was spent "riding by several times" (V.2:41), the opportunity to observe was substantially less than 15 minutes. Additionally, the agent was concerned about divulging his undercover status. Ellerbe, therefore, was continually checking the area for persons who would be familiar with him. The fact that the transaction occurred on a street corner in the presence of several other black males (V.2:41) had the effect of diverting Ellerbe's concentration from the suspect at hand. Finally, the agent had engaged in at least ten undercover buys over a short period of time,

each of which involved a transaction with black males. (V.2:12). Such a multitude of suspects, none of whom were apparently arrested at the time of each transaction, would have the effect of creating confusion in the mind of the witness.

Secondly, the witness' degree of attention is suspect by the fact that on two subsequent occasions when he claims to have seen the Petitioner, he did not seek to effect an arrest. On these two subsequent occasions, however, the witness was not acting in an undercover role, but was driving a vehicle which looked like "a regular detective car." (V.2:18). The only plausible explanation for Ellerbe's failure to arrest the suspect on those two subsequent occasions was that the suspect was not recognized.

The third fact to consider is the accuracy of the prior description of the accused. Ellerbe claimed to have made extensive notes regarding this description, but did not produce them at the Motion to Suppress hearing, despite the fact that the records were under subpoena. (V.2:8). Absent these records, he was unable to provide an adequate description of the suspect as he viewed him on the 26th of September, the day of the sale. Of course, he was able to describe the Petitioner by virtue of his subsequent visit to the jail, but was unable to describe the one thing about the suspect which would have been different on each occasion, namely his clothing. (V.2:32). The record shows only one description given prior to the visit to the jail, which was Ellerbe's statement to the Atlanta Police Department detectives, that "he was a real big guy." (V.2:23). As noted, this was the totality of his description. (V.2:23). While there is no doubt that the Petitioner is a large individual, such a description does not in any way single him out. It is further interesting to note that after

observing the Petitioner at the jail, the witness was then able to add flesh to the bare bone of his description. Thus, at the Motion to Suppress hearing, "a real big guy" become approximately "6'5", two hundred and fifty pounds, with no facial hair or scars." (V.2:32). No reason was offered by Ellerbe why such information was not of interest in the investigative stage of the proceedings.

The fourth factor to consider is the level of certainty demonstrated by the witness at the confrontation. Of course, at the Motion to Suppress hearing, the Agent asserted that the Petitioner was the same individual who had sold him the heroin. This should be expected of a police officer testifying on behalf of his own case. No evidence exists, however, of the level of certainty exhibited by the witness at the time of the in-jail confrontation, since the Agent went to the jail to see the Petitioner by himself. Thus, the identification process was so unnecessarily suggestive and conducive of irreparably mistaken identification so as to deny Petitioner due process of law.

C. THE IN-JAIL CONFRONTATION TAINTED ANY SUBSEQUENT IDENTIFICATION.

A most significant factor in this case involves the method by which Ellerbe acquired the last name of the Petitioner. As noted, Ellerbe acquired the last name of his suspect at the time he made application for an arrest warrant in late October or early November. (V.2:10). According to Ellerbe, the name was told to him by two police detectives after providing them with a vague description of the suspect. (V.2:23). This information did not come from his partner, Jimmy Holloway, who stated that 2 or 3 days after the incident he was aware of the

last name of Rodney (V.2:51). The information concerning the last name was provided to Ellerbe after he was informed that the Petitioner was in jail on other charges.

An examination of Ellerbe's testimony at the hearing on the Motion to Suppress, evidences the fact that he went to the jail in the hope of being able to charge a party already in custody. His visit was not for the purpose of serving the arrest warrant, since the evidence showed that he did not attempt to amend the warrant. He was thus able to view the Petitioner in a one to one confrontation which undoubtedly tainted any previous observation he had of the suspect in question. The result was that the Petitioner was automatically turned into the suspect.

The practical effect of this confrontation was that Ellerbe was given an opportunity to conclude a case which had remained unsolved prior to that time. Presented with a suspect already in custody on other charges, Ellerbe was able to dispose of his case by simply charging a criminal defendant with another crime. No real corroboration was required of Ellerbe's identification to support the conviction. Although the meeting in question had occurred a month prior to the confrontation and the confrontation occurred in a method which eliminated any possibility of review, the Court of Appeals failed to suppress the identification. As such, the Court failed to recognize that the confrontation was both suggestive and created an irreparable opportunity for misidentification. Accordingly, the Court erred is not suppressing the identification testimony of Agent Ellerbe.

CONCLUSION

Based on the foregoing reasons, Petitioner contends that the Georgia Court of Appeals erred in its decision below in that *United States v. Chadwick* should be extended to apply to personal property abandoned due to police misconduct; and in that the agent's in court identification was tainted by the prior one to one confrontation and should have been suppressed.

Therefore, a Writ of Certiorari should issue to review the judgment of the Georgia Court of Appeals.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By _____

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Jack Mallard, Esq., Assistant District Attorney, Atlanta Judicial Circuit, with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ____ day of _____, 1981.

_____

MARK J. KADISH

Appendices

APPENDIX A

[September 26, 1980]

AFFIRMED

60448. HOLLINGSWORTH v. THE STATE.
McM-160

60449. HOLLINGSWORTH v. THE STATE.
McM-161

McMURRAY, Presiding Judge.

These two cases involve indictments for the offenses of violation of the Georgia Controlled Substances Act. On September 26, 1979, the defendant allegedly did unlawfully sell heroin to an undercover agent. On October 15, 1979, he allegedly did unlawfully possess and have under his control heroin. Both cases were tried before the court without the intervention of a jury on February 12, 1980, although the cases were not combined. The findings of guilty rendered by the court clearly stated that a jury trial had been waived and after hearing the evidence and consideration of the same the defendant was found guilty beyond a reasonable doubt of violation of the Georgia Controlled Substances Act, as charged in each indictment. In each case the defendant was sentenced to serve a term of 6 years; 4 years to serve, the balance suspended upon condition the defendant not violate the criminal laws of any state or municipality or of the United States. The defendant appeals. *Held:*

1. An undercover police officer, a special agent of the Georgia Bureau of Investigation, testified that he, while in the company of an informant and under the observation of another officer, purchased the suspected heroin from the defendant known by the street name of "Rodney, also known as Big Man" on September 26, 1979, as shown in

the indictment. The defendant was not arrested at that time but after his arrest for the possession of heroin as shown in the indictment in Case No. 60448, he was served with the arrest warrant in this case (No. 60449) while in jail. The witness, however, did testify that he attempted on several occasions to purchase other drugs from him but was unable to make contact although he had seen him at least twice after he made the purchase in the southwest section of the City of Atlanta, and that at the time of the drug purchase he did not know the last name of "Rodney Big Man," learning of it at a later date.

The only enumeration of error in Case No. 60449 with reference to the sale of heroin by the defendant is that the trial court erred in overruling and denying defendant's motion to suppress the witness' identification. Defendant contends that the peculiar circumstances of the case against him relating to the alleged identification by the undercover police officer after he had been arrested on an unrelated charge of possession of heroin (Case No. 60448), under the totality of the circumstances, violated his rights to due process. The mere fact that after the purchase of the illegal heroin the undercover officer had probable cause to procure a warrant for the arrest does not require that the investigation cease and that the state immediately arrest the suspect. The undercover officer later learned that the defendant was in jail under arrest for the possession of heroin after observing him at the time of the purchase and approximately twice thereafter on the streets of the City of Atlanta. Visiting him in jail and serving the warrant there did not require that the identification of the defendant be suppressed as violative of the due process clause of the Fourteenth Amendment to the United States Constitution. See in this connection as to one-on-one confrontations between a witness and a suspect,

Stovall v. Denno, 388 U. S. 293 (87 SC 1967, 18 LE2d 1199). The trial court considered the testimony and under the totality of the circumstances held the identification was reliable. In consideration of the motion to suppress, the five factors with reference to whether the confrontation procedure was suggestive or not as set forth in *Clempson v. State*, 144 Ga. App. 625 (1), 626 (241 SE2d 495), showed the reliability of the undercover agent's identification of the defendant and his identification testimony was admissible in evidence. Neil v. Biggers, 409 U. S. 188, 199 (93 SC 375, 34 LE2d 401); *Davis v. State*, 233 Ga. 847, 849-850 (1) (213 SE2d 695); *Silvers v. State*, 151 Ga. App. 216, 218 (259 SE2d 203); *Daniel v. State*, 150 Ga. App. 798, 799-800 (1) (258 SE2d 604). The undercover officer's visit and observation of the defendant in jail under the charge of possession of heroin does not render his in-court identification as requiring the suppression of same. There is no merit in this complaint.

2. In Case No. 60448, which involves the possession of heroin, a police officer testified that on October 15, 1979 (the date alleged in the indictment), upon receipt of information from a confidential and reliable informant, a black male known only as "Rodney" was seen at a certain address in the City of Atlanta having in his possession a large quantity of heroin, the informant advising the police officer the type of automobile defendant was driving approximately 5 to 10 minutes before informant talked to the police officer. The officer received this information by telephone. The officer proceeded to the address given where he recognized the defendant from the description given to him by the informant as well as the automobile which had been reported to him by the tag number and the type of automobile. Because of the time element he was unable to obtain a search warrant but approached the

defendant, identified himself as a police officer, advised him of the information he had received, finding the defendant seated on the steps of the address in question (a single family dwelling, "an abandoned house . . . condemned by the City," with "condemned signs on the property"). The defendant advised him he could search the vehicle and he did so, finding no drugs in the vehicle but in "looking on the porch approximately three to five feet from where . . . [the defendant] was sitting inside the screened in porch . . . [the officer] . . . found sixteen . . . fifty dollar bags of heroin." The defendant denied any knowledge about the heroin, advising that he worked at a certain business, produced identification and was allowed to leave in his automobile. The police officer then proceeded to search inside the abandoned house and found a brown attache case containing "an additional one hundred eighty bags of heroin . . . having a value of fifty dollars per bag," and inside the attache case identification belonging to the defendant, that is, "an old driver's license with his picture on it . . . issued by the Department of Public Safety."

The first enumeration of error in this possession case is that the trial court erred in overruling and denying a motion to suppress the evidence with reference to the seizure of the heroin found on the premises at the old abandoned and condemned dwelling and in the attache case containing identification of the defendant. Defendant contends that this evidence was obtained as the result of an unreasonable, illegal and void search of his person and the search of the automobile. We note that no drugs were found on his person or in the automobile. Hence, the drugs cannot be said to be evidence obtained as the "fruit of the poisonous tree," as found in Wong Sun v. United States, 371 U. S. 471 (83 SC 407, 9 LE2d 441). The police

officer may not have felt that he had probable cause to arrest the defendant seated on the steps of the abandoned house after searching his automobile and patting him down and finding no suspected drugs, and then finding same inside the screened porch 3 to 5 feet from the defendant who produced proper identification and disclaimed any knowledge of the drug packets. Thereafter, the defendant was allowed to leave, and the officer then proceeded with a further investigation and found additional drugs inside the abandoned condemned dwelling in an attache case containing identification of the defendant. A search of defendant's car and person prior thereto in nowise was such an illegal act that would taint all evidence stemming therefrom if it could be said that the finding of the heroin inside the dwelling was derived from the search of the automobile in this instance. See *Brooks v. State*, 129 Ga. App. 109, 111 (198 SE2d 892); *Stiggers v. State*, 151 Ga. App. 546, 547 (1) (260 SE2d 413); United States v. Lovasco, 431 U. S. 783, 795-796 (97 SC 1505, 52 LE2d 92). Clearly the officer had probable cause to seize the evidence found at this abandoned and condemned dwelling house. *Berger v. State*, 150 Ga. App. 166, 168-169 (257 SE2d 8). The trial court did not err in denying the defendant's motion to suppress the evidence.

3. Defendant next contends that the trial court erred in refusing to order the disclosure of the identity of the informant. Evidence was presented during the hearing of the motion to suppress showing he was a mere tipster, and no evidence was produced that he was a party to the transaction. The informant in this case, who had been reliable in the past, did not go to the scene, was not present at the scene, and was in nowise shown to have been a participant in the placing of the heroin in the automobile or in the condemned dwelling. In fact, the heroin was not

found in the automobile or on the person of the defendant but in the abandoned condemned dwelling. The trial court, having heard all the evidence, concluded that the informant was in that class which need not be disclosed and denied the motion to disclose. See Code § 38-1102; *Howard v. State*, 144 Ga. App. 208, 211 (3) (240 SE2d 908); *Taylor v. State*, 136 Ga. App. 31 (2) (220 SE2d 49); *Drains v. State*, 138 Ga. App. 607, 608 (1) (226 SE2d 604); *Thornton v. State*, 238 Ga. 160, 165 (231 SE2d 729); *Stiggers v. State*, 151 Ga. App. 546, 549-550 (2), supra. There is no merit in this enumeration of error.

Judgments affirmed. Banke, J., concurs. Smith, J., concurs specially.

60448. HOLLINGSWORTH v. THE STATE
[Mc-161]

60449. HOLLINGSWORTH v. THE STATE
[Mc-162]

SMITH, Judge, concurring specially as to Division 2.

I agree with the majority that the search of the brief case discovered in the abandoned house was lawful. However, I reach this conclusion for reasons which differ from those expressed in the majority opinion.

In my view, the search was valid, not because "the officer had probable cause to seize the evidence found at this abandoned and condemned dwelling house," but because the evidence shows that appellant had voluntarily abandoned the brief case and its contents. As stated in Abel v. United States, 362 US 217, 241 (80 SC 683, 4 LE2d 668) (1960). "There can be nothing unlawful in the Government's appropriation of such abandoned property." See also *Hawkins v. State*, 146 Ga. App. 312, 313 (246 SE2d 343) (1978).

Appellant argues as follows: "The detention and the search of the Appellant and his vehicle were illegal, but did not result in the discovery of any evidence which the Appellant would later seek to suppress. It did, however, no doubt cause anxiety in the mind of the Appellant and cause him to flee the Ashby Street address at his earliest possible opportunity. His fear was of course justified, since if the law enforcement authorities were willing to commit one illegality, there was little doubt that they would go forward with another. Rather than be victimized by such illegality the Appellant left. Under such circumstances, it can scarcely be stated that the Appellant voluntarily abandoned his property."

Even assuming the search of appellant and his automobile was unlawful, appellant's argument must fail. "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. United States v. Cowan, 2d Cir. 1968, 396 F2d 83, 87." United States v. Colbert, 474 F2d 174, 176 (5th Cir. 1973). "Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search. United States v. Colbert, 474 F.2d at 176; cf. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 LE2d 576 (1967)." United States v. Jackson, 544 F2d 407, 409 (9th Cir. 1976). In the instant case, appellant was found sitting outside an abandoned and condemned dwelling. He had no property interest whatever in the premises and no reasonable expectation of privacy therein. See Abel v. United States, supra. Within three to five feet of appellant, in a screened-in area, packets of heroin were observed in plain view. Appellant denied having any knowledge of them. See United States v. Anderson, 500 F2d 1311 (5th Cir. 1974); United States v. Berkowitz, 429 F2d 921 (1st Cir. 1971). After appellant was permitted to leave, the police entered the abandoned dwelling and discovered a brief case. They opened it and found 190 packets of heroin, identical to those previously discovered, and appellant's identification. The brief case had been placed in the abandoned house prior to the arrival of the police. Its placement in the house was unrelated to any allegedly improper police conduct. See United States v. Maryland, 479 F2d 566 (5th Cir. 1973). Appellant made no mention of the brief case to police and did not attempt to regain possession of it at any time. Under these circumstances,

the trial court was authorized to find that the brief case had been voluntarily abandoned by appellant. United States v. Jackson, supra at 409. It appears from the record that, apart from any search, legal or illegal, appellant intended to totally disassociate himself from the brief case and its contents.

In view of the fact that the trial court was authorized to conclude that the brief case and its contents were abandoned, United States v. Chadwick, 433 US 1 (97 SC 2476, 53 LE2d 538) (1977), relied on by appellant for the proposition that a valid search of the brief case could not be undertaken without a warrant, is simply inapplicable. The trial court did not err in denying appellant's motion to suppress.

APPENDIX B

CLERK SUPREME COURT
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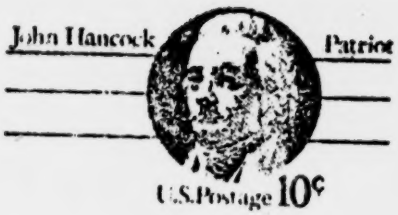

MR.....

ATTORNEY AT LAW,

....., GEORGIA

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta OCT 30 1980

Dear Sir:

Case No. 36903. Hollingsworth v The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

RETURN POSTAGE GUARANTEED
CLERK SUPREME COURT
506 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

Mr. Mark J. Kadish
ATTORNEY AT LAW
Suite 701-66 Luckie St
Atlanta, GEORGIA
30303

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Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA NOV 13 1980

The motion for a ~~rehearing~~ reconsideration + continuation of appeal bond was denied today:

Case No. 36903. Hollingsworth v. State

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

1c